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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

Respondent, Sellar Bullard, as Executor under the Last Will and Testament of Clara R. Smith, deceased, respectfully submits his brief in opposition to the petition of Guy T. Helvering, Commissioner of Internal Revenue, petitioner, for a writ of certiorari.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 134-148), is reported at 34 B. T. A. 243.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 165-172) is reported at 90 F. (2d) 144.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on May 25, 1937 (R. 172). The petition for certiorari was filed on August 25, 1937. Jurisdiction of this Court to issue the writ applied for is invoked by petitioner under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Petitioner has prayed that a writ of certiorari issue to review the question of the constitutionality of § 302(c), Revenue Act of 1926, as amended by Joint Resolution of Congress (Pub. 131), approved March 3, 1931, and by § 803(a), Revenue Act of 1932. This was but one of the four principal questions of law passed upon by the Circuit Court of Appeals (see *infra* pp. 6, 7). Respondent contends that the question presented by petitioner is not properly brought before this Court in this proceeding, for the reason that the Circuit Court of Appeals erred in finding that, under the peculiar facts of this case, the transfer involved was within the scope of said statute (see *infra* p. 9). If the lower court had not so erred, no constitutional question would have been before that court.

Statute Involved.

The statute with respect to which the constitutional question is presented by petitioner is § 302 (c), Revenue Act of 1926, c. 27, 44 Stat. 9, § 302 (c) (U. S. C., Title 26, § 411), as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 (U. S. C., Title 26, § 411) set forth in the Appendix *infra* p. 21.

Statement of the Case.

There has been no controversy with respect to the facts of this case. Petitioner introduced no evidence at the hearing before the Board of Tax Appeals, and the undisputed facts pertinent to the issues are set forth in the agreed Statement of Evidence (R. 17-36).

Petitioner's statement of facts (see pp. 2-5 of Petition) is insufficient for this Court to determine whether the writ should be granted, in that he has failed to state the following essential facts:

1. Decedent created an irrevocable *inter vivos* trust on March 3, 1927, consisting of securities of an aggregate value slightly in excess of $300,000, reserving to herself the income therefrom for life (Ex. 1, R. 37). Decedent executed a second irrevocable *inter vivos* trust on February 17, 1932, consisting of the same securities held under the 1927 trust, to the extent of one-third of the value thereof, also reserving to herself the income therefrom for life (Ex. 4, R. 64).

2. The trust of February 17, 1932, was executed in pursuance of a provision of an oral family settlement agreement, which provided for the preservation intact of one-third of the corpus of the 1927 trust and the dissolution of the remainder thereof.

After decedent was dissuaded by her family from filing a bill to declare the trust of March 3, 1927, invalid because of fraud in the inducement by her son Edward (R. 20, 21, 34), decedent was desirous of entering into an agreement with all the beneficiaries of that trust to secure its termination in order to effect a rearrangement of her property dispositions and get certain securities held under the trust out of the control of the trustee (R. 18-20, 32, 33). It was impossible to secure the consent to the termination of the trust of Virginia Winslow Smith, life beneficiary of one of the three $100,000 trust funds thereunder, unless her interest thereunder be preserved intact (R. 21, 28, 29, 35). The other adult beneficiaries consented to such termination upon decedent's promise to substitute other gifts to them for their interests under the trust (R. 21, 31, 32, 33, 34). It also was necessary, in order to secure a termination of the 1927 trust, to protect and preserve adequately the interests of the minor beneficiaries under that trust (R. 20). It was determined to effectuate the proposed family agreement by bringing a friendly family suit to terminate the trust of March 3, 1927, on some legal technicality (R. 21, 22, 34). The technicality advanced was that a part of the trust was invalid under the Rule against Perpetuities (R. 23, 34). In order to avoid unpleasant family controversy, an oral family settlement agreement was entered into between decedent and all the beneficiaries under said trust, which provided, in part, that upon dissolution of said trust by the entry of a decree in the pending action by consent of the adult beneficiaries, and upon representation to the court of the protection of the interests of the minors, one-third of the corpus of said trust should be preserved intact by the execution of a new trust instrument to carry the same (R. 22, 23, 28, 35). It was provided that this new trust should be created prior to the entry of a decree dis-

solving the old trust (R. 29, 35). The new trust was executed on February 17, 1932 (R. 23, 35), and a consent decree dissolving the old trust was entered subsequent thereto on February 27, 1932 (R. 25, 36; Ex. 20, R. 98). Apart from the recitals of the consent decree there was no determination of the invalidity of the trust of March 3, 1927, under the Rule against Perpetuities, or for any other reason.

3. The execution of the second trust of February 17, 1932, was but one of the provisions of the oral family settlement referred to above. This agreement was entered into by all the beneficiaries under the 1927 trust as a means of (1) securing the consent of Virginia Winslow Smith, a beneficiary under the 1927 trust, to its termination (R. 23, 28, 29, 35), (2) protecting the interests of the minor beneficiaries under the 1927 trust (R. 22, 27, 28, 33), and (3) securing decedent's release of whatever rights she might have to secure dissolution of the 1927 trust by prosecution of her pending action (R. 23, 35). These purposes were effectuated under the family settlement agreement in the following manner:

(a) Creation of the "second trust" of February 17, 1932, which preserved Virginia Winslow Smith's life interest under the 1927 trust intact, and gave the remainder interest thereunder to decedent's two daughters equally (Ex. 4, R. 64).

(b) Outright gifts of securities of the value of $10,000 to each of the decedent's two married grandchildren, in lieu of a part of their interests relinquished under the old trust (R. 22, 31).

(c) Execution of a new will by decedent making enlarged gifts to decedent's grandchildren (her five grandchildren received $25,000 each, including the $10,000 outright gifts

of securities to two of them referred to above (R. 22)), and setting up new trusts of $100,000 for each of decedent's two daughters for life, with remainders to their respective children (Exs. 5, 21, R. 72, 108). Certain of the grandchildren were minors.

(d) Entry of a consent decree dissolving the first trust, which decree recited the grounds set forth in the bill of complaint; representation being made to the court that the minor beneficiaries were receiving in lieu of their interests under the old trust more valuable interests under the provisions of the family agreement.

Issues Determined by Circuit Court of Appeals.

Since the question of the constitutionality of the taxing statute is the only question presented upon which a review by this Court is prayed by petitioner, and since it is the contention of respondent that this constitutional question does not come properly before this Court in this case, it is important to set forth the exact issues which were before the Circuit Court of Appeals. These were as follows:

1. Whether under the peculiar facts of this case the second trust of February 17, 1932, is within the scope of § 302(c) of the Revenue Act of 1926 as amended by Joint Resolution of Congress (Pub. 131), approved March 3, 1931, or as further amended by § 803(a) of the Revenue Act of 1932;
2. Whether said §.803(a) of the Revenue Act of 1932 may be applied retroactively to said trust created before the date of its enactment;

3. If said second trust is within the scope of said § 302(c) of the Revenue Act of 1926, with any applicable amendment thereto, whether the application of said statute, with such amendment, to include the entire corpus of said trust in decedent's gross estate for federal estate tax purposes is a constitutional exercise of the taxing power under the Fifth Amendment;

4. Whether said second trust is subject to federal estate tax under the provisions of § 302(d), Revenue Act of 1926, because of the reservation of a possibility of reverter to the settlor.

The Circuit Court of Appeals held (1) that the trust of February 17, 1932, the so-called "second trust", was within the scope of § 302(c), Revenue Act of 1926 as amended by the 1931 Joint Resolution (R. 165, 167, 168), (2) that the 1932 amendment was immaterial in view of the court's conclusions (R. 165, 168), (3) that the application of § 302 (c) as amended by the 1931 Joint Resolution to include the corpus of the second trust in the gross estate of decedent for federal estate tax purposes was in violation of the Fifth Amendment to the Constitution (R. 165, 168-171), and (4) that the second trust was not subject to federal estate tax under the provisions of § 302(d), Revenue Act of 1926 (R. 165, 171, 172).

SUMMARY OF ARGUMENT.

The writ of certiorari prayed for by petitioner should be denied for the following reasons:

1. No question with respect to the constitutionality of § 302(c), Revenue Act of 1926, with any applicable amendment thereto, is properly before this Court, for the reason that the Circuit Court of Appeals erred in not holding that the trust of February 17, 1932, was not within the scope of said statute. If the Circuit Court of Appeals had so held, no decision upon the constitutional question would have been necessary.

2. Even if the trust of February 17, 1932, should be found properly to be within the scope of said § 302(c), Revenue Act of 1926, with any applicable amendment thereto, the decision of the Circuit Court of Appeals that said § 302(c), as amended by Joint Resolution (Pub. 131), approved March 3, 1931, is in violation of the Fifth Amendment in so far as applicable to this trust, is in accord with decisions of this Court which are controlling with respect to the issues here presented, and is not in conflict with any decision of this Court or with a decision of a Circuit Court of Appeals in any other circuit.

ARGUMENT.

I. No constitutional question is properly before this Court for determination.

The question with respect to whether § 302(c), Revenue Act of 1926, as amended by Joint Resolution (Pub. 131), approved March 3, 1931, is in violation of the Fifth Amendment to the Constitution of the United States, urged by petitioner as the ground upon which the Court should grant a writ of certiorari in this cause, is not properly before this Court, for the reason that the Circuit Court of Appeals erred in holding, under the undisputed facts of this case, that the trust of February 17, 1932, was within the scope of said statute as amended.*

*Respondent, in contending that the Circuit Court of Appeals erred in holding that the trust of February 17, 1932, was within the scope of § 302(c) as amended by the 1931 Joint Resolution, has not filed a cross-petition for certiorari, since such procedure has been held by this Court to be unnecessary where, as in this case, respondent raises this point, not to attack the decision below, but to sustain it,—the error of the lower court being in its interpretation of the undisputed facts rather than in its judgment. *Langnes* v. *Green*, 282 U. S. 531, 536-539; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506, 509; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560. See also *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 238, 239. On certiorari to the Circuit Court of Appeals, the entire record is before this Court with power to review the action of the Circuit Court of Appeals and direct such disposition of the case as that court might have made of it. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567.

If the Circuit Court of Appeals had found, as the undisputed facts require, that the said "second trust" was not within the scope of said statute, no question of the violation of any constitutional provision by the application of said statute would have been before that court. Hence no question with respect to the constitutionality of said statute is now before this Court, if the Circuit Court of Appeals was in error in its finding with respect to the facts.

The Circuit Court of Appeals found the trust of February 17, 1932, to be within the scope of the statute upon the theory that since the consent decree terminating the old trust decreed that the property held thereunder be transferred back to decedent, the execution of the "second trust" was a new transfer by decedent of property owned by her free of any claim of any other person (R. 165, 167).

In reaching this result the court disregarded the entire purpose and legal effect of the family settlement agreement, the terms of which agreement the court accurately sets forth in its opinion as a part of the undisputed facts of the case (R. 165, 166).

The purpose of this family settlement agreement was to assure to the other beneficiaries of the first trust of March 3, 1927, that if they should consent to a dissolution of that trust, they could compel decedent to perform her part of the agreement, viz: (1) execution of the new trust, (2) making the outright gifts to grandchildren, and (3) execution of the new will bequeathing greatly enlarged interests thereunder to both children and grandchildren.

The general plan of the family settlement agreement was agreed upon by decedent and the beneficiaries of the 1927 trust other than Virginia Winslow Smith (life beneficiary as to one-third after decedent's death, who refused to consent to termination of the trust until assured of the preservation of her interest intact), prior to institution of the action to terminate said trust (R. 22, 23, 34). The

specific terms of said agreement were formulated and agreed to by Virginia Winslow Smith, and all the other beneficiaries of said trust prior to entry of the consent decree terminating said trust, which decree was entered in pursuance of said agreement (R. 23, 35). The agreement provided that the adult beneficiaries would consent to the entry of the decree on the grounds stated in the bill in consideration for decedent's promise to perform the other provisions of the agreement, including the preservation of one-third of the trust corpus intact by execution of the new trust instrument (R. 23, 35). Fulfillment of those provisions of the agreement by decedent was conditioned upon the consent of the beneficiaries to such entry of the decree. Thus, the beneficial interests of the parties were fixed by the agreement and not by the consent decree entered in pursuance thereof.

The effect of this agreement was in no way changed by the recital of the consent decree that the trust of March 3, 1927, was void because in violation of the Rule against Perpetuities, and that said trust was thereby dissolved and the property held thereunder transferred back to the donor. This decree was the proper means to effect the end desired, viz: dissolution of the old trust by consent of the adult beneficiaries, and the representation to the court that the interests of the minor beneficiaries were being adequately protected under the family agreement by interests being given to the minor beneficiaries of greater value than they had had under the old trust. The consents of the beneficiaries other than decedent to the termination of the 1927 trust as to the two-thirds thereof which did not constitute the corpus of the second trust, furnished adequate consideration for the promises of decedent to execute the new trust instrument preserving the one-third of the old trust corpus intact, to execute the new will, and to, make the substantial outright gifts.

If decedent had in any manner failed or refused to carry out her part of the contract, which included her agreement to execute the new trust to preserve intact one-third of the old trust corpus, she could have been compelled to do so by an action by the other beneficiaries to compel specific performance of her agreement. That was the purpose of the family agreement. Otherwise there would have been no reason for entering into any such agreement.

Although the consent decree be considered as a judicial determination that ownership of the property held under the first trust was revested in decedent upon the dissolution thereof, as held by the Circuit Court of Appeals (R. 165, 167), the *beneficial* title to that part of the trust property which constituted the corpus of the second trust remained in the beneficiaries by reason of the family settlement agreement nevertheless. The fact that the consent decree ordered the return of the corpus of the first trust to decedent did not affect her agreement to keep one-third of the corpus thereof intact by executing the new trust instrument. This agreement could have been enforced against her by the beneficiaries. It is settled in Illinois that the provisions of a family settlement agreement are specifically enforcible in equity. *Stedman* v. *Tate*, 326 Ill. 442, *Wolf* v. *Uhlemann*, 325 Ill. 165, *Hagen* v. *Anderson*, 317 Ill. 173.

It is clear, therefore, that irrespective of the recitals of the consent decree, decedent, upon dissolution of the first trust, received back only legal title to the property held thereunder which was to constitute the corpus of the second trust. Equitable title to such property remained in the beneficiaries as provided by the provisions of the family agreement, on behalf of which beneficiaries decedent acted in executing the second trust to preserve their equitable interests as provided by said agreement. The actual

"settler" of a trust is the actual beneficial owner of the trust property at the time of creation of the trust. See *Maynard* v. *Farmers Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. S. 83 (affirmed 238 N. Y. 592, 144 N. E. 905), *DeRousse* v. *Williams*, 181 Iowa 379, 164 N. W. 896.

Since decedent, upon dissolution of the first trust, received no more than bare legal title to the property comprising the second trust, it must follow that the second trust was merely a continuation of the first trust as to one-third of the property held thereunder, and was not itself a new transfer.

The first trust, created in 1927, being irrevocable, was not subject to federal estate tax under § 302(c), Revenue Act of 1926. *May* v. *Heiner*, 281 U. S. 238. The preservation of the already vested interests in one-third of the corpus thereof by means of the execution of the second trust was therefore not within the scope of either the 1931 Joint Resolution amending § 302(c), or of § 803(a), Revenue Act of 1932, again amending said section, since the rule has been settled by this Court that a federal estate tax statute can have no retroactive effect to tax such a transfer completed before enactment of the statute. *Helvering* v. *Helmholz*, 296 U. S. 93, *White* v. *Poor*, 296 U. S. 98.

After enactment of the 1931 Joint Resolution amending § 302(c), the Treasury Department ruled that only prospective application should be given to that statute. T. D. 4314, X-1, C. B. 450; see Appendix *infra* p. 22. This ruling was incorporated into the Regulations. See Reg. 70, Art. 18, Appendix *infra* p. 24. The Treasury Department later reversed its position on November 7, 1934, subsequent to the date of decedent's death, which occurred on May 24, 1933. Reg. 80, Art. 18(b).

Petitioner states that he shall contend that a retrospective application of the 1931 and 1932 amendments to the 1927 trust is not unconstitutional (see Petition, pp. 8, 9, footnote). This point has been settled by this Court against petitioner's contention in *Helvering* v. *Helmholz*, and *White* v. *Poor*, *supra*. It also is important to note that this proceeding does not involve any attempt to collect a deficiency tax based upon the inclusion of any part of the 1927 trust in decedent's gross estate, the assessment having been levied by the Commissioner upon the corpus of the 1932 trust (R. 5, 6, 135, 165).

Respondent respectfully submits that if the Circuit Court of Appeals had not erred in its legal conclusion arrived at upon the basis of the undisputed facts, the decision in this case would have been confined to its own peculiar facts, and that by reason of that error no constitutional question nor any question requiring the cognizance of this Court now is properly before this Court for decision.

II. The decision of the Circuit Court of Appeals on the constitutional question is in complete accord with decisions of this Court controlling with respect to the issues here presented.

This respondent respectfully submits that the decision of the Circuit Court of Appeals is entirely in accord with and based upon decisions of this Court which have clearly established the constitutional principles of federal estate taxation upon which this decision is based.

These decisions are fully set forth by the Circuit Court of Appeals in its unanimous opinion herein (R. 168). The event which gives rise to the federal estate tax is the death of the decedent with the resulting transfer of his estate, either by will or the laws relating to intestacy; *Helvering*

v. *St. Louis Union Trust Co.*, 296 U. S. 39, 41. In order for the estate tax to attach to a transfer, the taking effect of the transfer must be dependent upon and in some way effectuated by decedent's death. *Shukert* v. *Allen*, 273 U. S. 545, 547.

In *Nichols* v. *Coolidge*, 274 U. S. 531, 540, this Court held that an irrevocable *inter vivos* transfer with the reservation of a life interest to the transferor but with the remainder interests vested at the time of the transfer "was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death." Continuing, the Court said in that case (at p. 540): "The mere desire to equalize taxation cannot justify a burden on something not within congressional power". In *Coolidge* v. *Long*, 282 U. S. 582, 597, it was held that the provision for the payment of income to the settlors of a trust during their lives did not operate to postpone the vesting in the remaindermen of the right to possession or enjoyment, that the death of the settlor-life tenants was not the generating source of any right in the remaindermen, and that nothing moved from the settlor-life tenants to the remaindermen upon the settlor's death. This rule was recently reiterated in *Binney* v. *Long*, 299 U. S. 280, 287, 288.

In *May* v. *Heiner*, 281 U. S. 238, *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, *Morsman* v. *Burnet*, 283 U. S. 783, and *McCormick* v. *Burnet*, 283 U. S. 784, the rule was established by this Court that an irrevocable *inter vivos* transfer not made in contemplation of death, with the entire interest in remainder vested at the time of the transfer in persons other than the transferor, but with the reservation to the transferor of the income from the property for life, is a transfer *complete when made*, and is not a transfer testamentary in nature, and that upon

the death of the transferor-life tenant nothing passes from him to the remaindermen.

This rule has been consistently applied by this Court. In *Helvering* v. *Helmhole*, 296 U. S. 93, 98, and *White* v. *Poor*, 296 U. S. 98, 102, cases involving the retroactive application of § 302(d), Revenue Act of 1926, it was held that where decedents created irrevocable *inter vivos* trusts reserving the income of the whole or a part of the trust property to themselves during their lives, the respective transfers were *complete* at the time of the creation of the respective trusts. The test of taxability based upon the determination of completeness of the transfer at the time when made was also applied in *Klein* v. *United States*, 283 U. S. 231, in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and in *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48.

Nichols v. *Coolidge* and *Coolidge* v. *Long*, *supra*, were cases involving the retroactive application of the taxing statute. *May* v. *Heiner* and the three *per curiam* cases *supra* were cases involving the construction of the language of the taxing statute. However, the same rules therein enunciated and consistently followed were applied by this Court on the question of the constitutionality of the taxing statute under the Fifth Amendment, in *Heiner* v. *Donnan*, 285 U. S. 312. In that case, which involved the precise question of the constitutionality of the conclusive presumption provided by § 302(c), Revenue Act of 1926, that all transfers by a decedent made within two years prior to his death and without consideration, were made in contemplation of death, this Court held that provision as applied to an irrevocable transfer by *inter vivos* trust to be in violation of the due process clause of the Fifth Amendment, and laid down the principle that *transfers* inter vivos

not testamentary in character may not constitutionally be taxed under a death tax statute. See also *Handy* v. *Delaware Trust Co.*, 285 U. S. 352.

The rule was enunciated in *Heiner* v. *Donnan* that Congress may not label a transfer as testamentary which is not in fact testamentary in character for the purpose of subjecting it to a death tax; and the Court said (at p. 327) that such an attempt "is to measure the tax on A's property by imputing to it in part the value of the property of B," and is such an arbitrary and capricious exercise of the taxing power as to be a denial of due process of law under the Fifth Amendment.

Respondent would not deny that Congress has the power, in order to prevent evasion of estate tax, to reach *inter vivos* substitutes for testamentary dispositions, as for example in levying such a tax upon *inter vivos* transfers made in contemplation of death. See *United States* v. *Wells*, 283 U. S. 102, 116, 117. However, for such a tax to apply, the transfer made must actually be one testamentary in character. *May* v. *Heiner*, 281 U. S. 238. And such a transfer as that involved in this case has been clearly determined by this Court not to be a transfer testamentary in character, since nothing passed from the decedent to anyone else as the result of her death, the interest which she possessed immediately prior to her death being merely obliterated by that event. *May* v. *Heiner*, *supra*, at p. 243.

Respondent respectfully submits that the above rules as enunciated and consistently applied by this Court have been properly applied by the Circuit Court of Appeals in its decision in this case. There is no decision in conflict with this decision in any other circuit.

Respondent has attempted to draw an implication in the language of the *per curiam* decisions in *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, *Morsman* v. *Burnet*, 283 U. S. 783, and *McCormick* v. *Burnet*, 283 U. S. 784, that this Court intended to imply by the statement "there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved * * *", that Congress *did* have the constitutional authority to impose prospectively such a tax (See pp. 7, 9 of Petition). Respondent submits that petitioner has placed an erroneous meaning on said statement of this Court in said *per curiam* decisions by lifting said statement out of its context.

Respondent submits that this Court, in said *per curiam* decisions, did not intend to pass upon the constitutional authority of Congress to impose such a tax, but merely stated that said decisions were based upon the decision in *May* v. *Heiner*, 281 U. S. 238, a case of statutory construction, there being no constitutional question involved in said *per curiam* decisions.

Petitioner cites the decision of this Court in *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509 (see Petition, p. 10) and advances the proposition that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the decision of this Court in the *Guaranty Trust Co.* case. The decision in that case was that the State of Connecticut had power to levy a succession tax upon an *inter vivos* transfer with the reservation of a life estate, following the *dictum* of *Coolidge* v. *Long*, 282 U. S. 582, 596, that "Undoubtedly the *State* has power to levy such an excise upon property so passing after the taking effect of the taxing Act." (Italics ours.) The constitutional question with respect to the validity of such a succession

tax upon the interests transferred to beneficiaries by death bears no similarity to the constitutional question involved in the instant case. See *Nichols* v. *Coolidge*, 274 U. S. 531, 537; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62.

With respect to the amount of revenue involved in the decision upon the constitutional question,—it is obvious, as pointed out by this Court in *Heiner* v. *Donnan*, 285 U. S. 312, at p. 322, that the value of the remainder interests under such a transfer may be subjected to a gift tax levied at the time of the transfer. That the end to be achieved is desirable from the standpoint of revenue is no justification for the imposition of an unconstitutional tax.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

SAMUEL S. HOLMES,
Counsel for Respondent.

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Of Counsel.

September 14, 1937.

APPENDIX.

Sec. 302(c), Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Joint Resolution (Pub. 131) approved March 3, 1931, c. 454, 46 Stat. 1516, so far as material to the issues in this case, is as follows:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

Sec. 803(a), Revenue Act of 1932, c. 209, 47 Stat. 169, further amending said Sec. 302(c), Revenue Act of 1926, so far as material to the issues in this case, is as follows:

Sec. 803. FUTURE INTERESTS.

(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *" (U. S. C., Title 26, Sec. 411).

Treasury Decision, T. D. 4314, X-1 C. B. 450:

TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302(c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10:30 P. M., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death* (1) *the possession or enjoyment of, or the income from, the property or* (2) *the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S. 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* 51 S. Ct., 342), *Edgar M. Morsman, jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, *i. e.,* to such transfers coming within the amendment as were made *after* 10:30 P. M., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

David Burnet,

Commissioner of Internal Revenue.

Approved May 22, 1931

A. W. Mellon,

Secretary of the Treasury.

Treasury Regulations 70 (as amended by T. D. 4336, XI-1 C. B. 329, April 11, 1932.

Art. 18. *Retention of Possession, Enjoyment, or Income.*—Any transfer which was made by the decedent after 10:30 P. M., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.